BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-140
Southwestern Bell Telephone Company	)	Transmittal Nos.
Tariff F.C.C. No. 73	)	2433 and 2449
	)	

REBUTTAL OF SOUTHWESTERN BELL TELEPHONE COMPANY

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October 10, 1995

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SUMMARY*

In this fourth pleading filed in this matter, SWBT again explains that its RFP tariff filing is a reasonable response to the competition facing SWBT, and respectfully requests that its effectiveness should be delayed no more. The transmittals are only opposed by competitors of SWBT, and no customers of SWBT that are primarily end-users have asked the Commission to investigate it any further. Only the parties with vested interests in keeping SWBT handicapped have asked the Commission to delay and reject SWBT's attempt to more fully compete with other service providers.

SWBT shows in this Rebuttal that it has met all the elements of the competitive necessity doctrine. MCI has provided the proof here that competition exists. The filing is no more discriminatory than the hundreds of contract and ICB tariffs filed by SWBT's competitors. SWBT's RFP filing will result in lower prices for consumers and will thereby be in the public interest.

SWBT's competitors have also claimed that SWBT's filing is vague. SWBT shows herein that its tariff is not vague, and is much more precise than its opponents' tariffs, which the Commission has allowed to take effect. SWBT's competitors also argue that this matter is not properly covered in a tariff proceeding. On the contrary, SWBT explains herein that the issues raised in this proceeding cannot, and need not, await the end of the Price Cap review docket.

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* All abbreviations used herein are referenced within the text.

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Southwestern Bell Telephone Company (SWBT), hereby files its Rebuttal to the Oppositions filed against SWBT's Direct Case in the above-styled matter.[1] The Oppositions, all filed by companies that compete in one or more markets with SWBT, display their vested interest in preventing SWBT from competing effectively for business to be gained from submitting bids in response to requests for proposals (RFPs). In that context, the Oppositions provide no basis to reject SWBT's Transmittal Nos. 2433 and 2449. Notably, no end user customers opposed SWBT's filing. Thus, SWBT respectfully requests that the Commission allow SWBT's transmittals to take effect, and end the investigation and suspension of SWBT's RFP tariff filing.

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[1] Oppositions were filed by the Association for Local Telecommunications Services (ALTS); AT&T Corp. (AT&T); MCI Telecommunications Corporation (MCI); MFS Communications Company, Inc. (MFS); Multimedia Hyperion Telecommunications (Multimedia); and Time Warner Communications Holdings, Inc. (Time Warner). The RFP Tariff Designation Order, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2433 and 2449, CC Docket No. 95-140, Order Designating Issues for Investigation (Com. Car. Bur., released August 25, 1995) (DA 95-1867) (RFP Tariff Designation Order), states that SWBT may file its Rebuttal by October 9, 1995, which is a Commission holiday. Under 47 C.F.R. Section 1.4(j), SWBT is submitting this Rebuttal on the next business day.

The theme of SWBT's competitors is consistent. They all want SWBT to be handicapped while each of them uses unlimited pricing flexibility to gain market share. Specifically, they all want SWBT to be prohibited from responding competitively to customer-issued RFPs, thereby allowing them to establish their own individual case basis (ICB) price that is low enough (i.e., lower than SWBT's tariffed rate) to win the business yet high enough to guarantee them safe profits. This process forces customers to pay higher rates than would otherwise be available to them when all competitors are allowed to freely respond to the customer's RFP.

I. INTRODUCTION

The RFP process is an established process which business customers have used for many decades to acquire goods and services. With increasing frequency, business customers are choosing to acquire telecommunications services in the same manner. Prospective customers use the RFP process to find the vendors whose services offer them the "best fit," the highest quality and the lowest cost. In essence, the RFP process is the "competitive arena" in which business will be won or lost. The question before the Commission is whether local exchange carriers (LECs) should be allowed to compete in this arena. If the answer to this question is "no," then SWBT's potential customers and the competitive process will be harmed because a major provider is not allowed to compete. SWBT should be allowed to respond to customer RFPs without being subject to lengthy delays in placing its tariffs into

effect, market loss quotas, floors on the number of respondents, evaluation of the state of competition in other unrelated markets, "checklists" or other elaborate competitive "tests" designed to handicap incumbent providers.

SWBT's Transmittals Nos. 2433 and 2449 constitute a reasonable response to the competition facing SWBT in specific markets. SWBT's transmittals reflect a limited response that makes the marketplace more, not less, competitive. As such, these transmittals are consistent with the Commission's public interest objectives and should be approved.

II. THE COMPETITIVE NECESSITY DOCTRINE JUSTIFIES ACCEPTANCE OF SWBT'S FILING.

AT&T claims that SWBT is not entitled to use the competitive necessity test.[2] On the contrary, SWBT has shown how it meets the qualifications of the competitive necessity doctrine.

AT&T tries to limit the applicability of the competitive necessity doctrine. Nevertheless, it is clear that AT&T has not always held this strict view of the competitive necessity doctrine. AT&T has previously argued that its Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2 Resort Condominiums International, Transmittal No. 1854, was reasonable as justified by the competitive necessity guidelines:

> AT&T cites the Commission's Private Line Guidelines which describe the showing that a carrier can make to justify an otherwise discriminatory volume discount on the grounds

[2] AT&T at pp. 7 through 10.

> of competitive necessity. See Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923 948 (1984). The Guidelines require a carrier relying on competitive necessity to demonstrate, in essence, that the customers of the discounted offering have a competitive alternative to choose from; the discounted offering responds to competition without "undue" discrimination; and the discount contributes to reasonable rates and efficient services for all users.[3]

As SWBT has already shown in its D&J, Comments, Reply Comments, and Direct Case, in the instant matter MCI (the primary customer of the proposed discounted offering) had a competitive alternative to choose from, SWBT's tariff offering responded to competition without undue discrimination, and the offering contributed to reasonable rates and efficient services for all users.[4] The following subsections confirm that competition exists, that SWBT's filing is not unreasonably discriminatory, and that it is in the public interest.

A. No Party, Especially MCI, Can Properly Deny That Competition Already Exists.

Almost all of the competitors filing oppositions to SWBT's Direct Case claim that SWBT has not shown the requisite "competition" that the "competitive necessity" doctrine requires.[5] Notwithstanding the claims of these oppositions that SWBT is not

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[3] AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2 Resort Condominiums International, Transmittal No. 1854, 6 FCC Rcd 7005 (1991), at fn. 4.

[4] See D&J, Section 1.5, pp. 4, 6; SWBT Reply Comments, pp. 2-3; SWBT Comments, pp. 2-4.

[5] See AT&T at pp. 7-10, MCI at pp. 6-11, Multimedia at pp. 5-6, and Time Warner at pp. 10-11.

subject to "certificated," "flourishing," or "substantial" competition, SWBT is indeed subject to the level of competition necessary to justify its tariff filing.

One need examine no more evidence than MCI's own actions to realize that competition does exist. As SWBT has shown, MCI asked SWBT in each of the RFPs in question for SWBT's "competitive response." MCI does not deny that the letters in question asked for such a "competitive response." Nor does MCI attempt to explain how SWBT could be counted upon to give a "competitive response" if there was no competition for the services in question. Indeed, in each of the MCI RFPs, MCI later notified SWBT that it had "elected to utilize the services of another vendor."

The Commission has stated that "a service will be deemed subject to competition if interconnectors have provided service of that type over their own circuits using expanded interconnection."[6] In this case, MCI does not deny that a competing vendor will be displacing the SWBT services. While it is unclear (at least in the St. Louis case) whether expanded interconnection will be used, certainly the existence of another "vendor" facility proves the existence of competition.

Since SWBT has satisfied this burden of proof on the issue of competition with "proof positive" from MCI, neither MCI

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[6] Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Cost, CC Docket Nos. 91-141, 92-222, 7 FCC Rcd 7369 (1992) at fn. 412.

nor any other party should be allowed to claim that a higher standard must be met.

One of the oppositions claims that no certificated competitor is present.[7] This claim is irrelevant since MCI clearly indicates that it is using "another vendor." Other oppositions claim that "flourishing" or "substantial" competition is not present.[8] These arguments are also irrelevant since they apparently agree that "some" competition exists, and unreasonably attempt to establish a higher standard for the competitive necessity doctrine. These qualifiers do not appear in the definition of the competitive necessity doctrine quoted above.

B. SWBT's Filing Is Not Unreasonably Discriminatory.

AT&T alleges that the RFP tariff filing process will result in unduly discriminatory rates.[9] Likewise, ALTS claims that SWBT's proposal violates the Communications Act.[10] These claims are totally without basis. If it were, all other bidders that similarly use specific rates would also be violating the Communications Act, and would be pricing in an unreasonably discriminatory manner.

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[7] Multimedia at p. 6.

[8] See, Time Warner at p. 3; MCI at pp. 6-11.

[9] AT&T at p. 9.

[10] ALTS at pp. 4-6.

ALTS' members routinely file contract rates and individual proposals.[11] AT&T has filed numerous "contract" tariffs. To now claim that SWBT's two RFP filings violate the Communications Act, while the hundreds of individual case filings and contract tariff filings made by ALTS' members and by AT&T do not, is truly "an awesome defiance of logic."

C. SWBT's Transmittals Are In The Public Interest.

AT&T claims that SWBT has "nowhere" addressed "the public interest concern . . . in ensuring a marketplace in which competitive access providers can gain a meaningful foothold prior to increased pricing flexibility for LECs,"[12] citing to the zone density pricing orders. If AT&T is attempting to claim that LEC competitors are entitled, as a matter of public interest, to a specific percentage share of the market, it is incorrect.

AT&T misreads the zone density pricing orders. These orders granted additional pricing flexibility when collocation is operational. The Commission did not, however, foreclose competitive responses to other forms of competition where it exists. To do so would invalidate past orders and Commission precedent including the Private Line Rate Structure and Volume

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[11] See, TCG Inc. Tariff F.C.C. No. 2 Transmittal No. 11, filed August 3, 1995 (ICBs found in Section 6 at page 162 - 179.1); MFS Telecom, Inc. Tariff F.C.C. No. 2 Transmittal No. 21, filed August 1, 1995 (Listing of Contract Arrangements Appendix A through J); Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, (FCC 95-393) (released September 20, 1995) at fn. 226. ("Nondominant common carriers routinely file contract rates for interstate services.")

[12] AT&T at pp. 5-6.

Discount Practices Order.[13] If SWBT is foreclosed from responding to competition, then customers will be denied the benefits of competition including lower prices and more responsive offerings. This result would not be in the public interest.

Time Warner alleges that the RFP process would prematurely deregulate SWBT before a competitive market exists and questions SWBT's understanding of market power issues and competitive market assessment.[14] Time Warner further states that "SWBT's claim that it lacks market power cannot be given serious consideration."[15]

Contrary to Time Warner's claims, SWBT did not address issues of market power determination, nor makes any claims regarding market power in its Direct Case filing. Such a determination goes far beyond the scope of this RFP tariff filing and is not necessary for the Commission to issue its ruling.

This case addresses a much more limited question, namely whether it is in the public interest to allow the incumbent service provider to develop a competitive offering in those specific instances when a customer has already obtained, or is in the process of obtaining, a competitive bid from at least one other provider. Clearly, this result is in the public interest. Customers soliciting such bids cannot be made worse off by allowing

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[13] Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246 97 F.C.C. 2d 923 (1989).

[14] Time Warner at p. 10.

[15] Time Warner at p. 11.

the incumbent to tailor its service offerings to meet the specific needs and requirements of the customer at prices at least comparable to other available offers. The number of providers participating in this bidding process, or their relative market shares, are largely irrelevant. What matters is the result of the bidding process: greater choice of service offerings that better meet the customers' needs at lower prices that more closely reflect underlying costs.

In addition, Time Warner misses the mark with regard to the effects of market power. Market power refers to the ability of a firm to increase and sustain prices above competitive levels without losing so many sales that the increase is unprofitable. Thus, market power is concerned with unreasonably high prices, not with a firm's ability to lower prices. The RFP tariff clearly results in lower prices to customers, not higher prices. Lowering prices is not anticompetitive, nor an abuse of market power, as long as prices equal or exceed incremental costs. Time Warner simply tries to confuse the issue by incorrectly portraying SWBT's Direct Case and introducing the much broader issue of market power determination.

Since the result of SWBT's filing would be to provide lower prices to customers, SWBT has satisfied the portion of the competitive necessity doctrine that asks that the filing "contribute" to reasonable rates and efficient services for all users. Allowing SWBT to compete does so and is thus in the public interest.

III. SWBT'S FILINGS ARE CONSISTENT WITH THE APPLICABLE ORDERS.

ALTS claims that SWBT's filings violate the Private Line Rate Structure and Volume Discount Practices Order and the DS3 ICB Order.[16] On the contrary, however, as previously explained,[17] SWBT's filing is consistent with all of the Commission's orders.

SWBT's Transmittal No. 2433 Description and Justification (D&J) fully explained how SWBT's filing qualifies under the competitive necessity doctrine as explained in the Private Line Rate Structure and Volume Discount Practices Order as an exception to the pricing restrictions contained in the DS3 ICB Order.[18]

ALTS also claims that SWBT's arguments have been previously rejected in the context of the DS3 ICB Order.[19] Nevertheless, it is clear that SWBT did not have the same conclusive evidence of competition (MCI's requests for competitive bids from SWBT) in that proceeding. The current facts justify the filings SWBT made.

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[16] ALTS at pp. 2-3.

[17] See, D&J at pp. 2-3; SWBT Comments at pp. 9-10.

[18] ALTS claims that SWBT's filings violate the DS3 ICB Order. However, ALTS neglects to explain how the similar individual case basis or contract filings of its own members do not. There is no statement in the DS3 ICB Order that explains that the interpretations of the Communications Act contained in the DS3 ICB Order do not equally apply to "nondominant" carriers. ALTS obviously believes the opposite view, that its members are not subject to the DS3 ICB Order. Only when ALTS takes the position that its members are not subject to the order can ALTS argue that the DS3 ICB Order should be applied so strictly. Since the principles of the DS3 ICB Order equally apply to ALTS' members, ALTS' position should be rejected.

[19] ALTS at pp. 3-4.

IV. SWBT IS NOT SEEKING ICB PRICING RELIEF NOR A "CONTRACT" TARIFF IN THIS FILING.

ALTS claims that SWBT is attempting to seek ICB tariffing ability and the right to file contract tariffs in this matter.[20] ALTS, however, mischaracterizes this proceeding.

As SWBT has previously explained in its Comments in response to the petitions filed against its Transmittal No. 2433, SWBT's RFP offering is not an ICB nor a contract tariff offering, but rather a general offering available to all similarly situated customers.[21] Thus, the restrictions in the Commission's rules regarding the filing of contract-based tariffs do not apply to SWBT's Transmittal Nos. 2433 and 2449. Likewise, the restrictions regarding "ICB relief" raised by ALTS also do not apply to SWBT's filing.

V. SWBT'S TARIFF LANGUAGE IS CLEAR AND UNAMBIGUOUS.

AT&T and MFS claim that SWBT's tariff is vague and ambiguous.[22] On the contrary, SWBT's tariff clearly states the terms and conditions under which it is available.

The fact that SWBT has offered to clarify certain terms of its offering does not indicate that it is otherwise vague. SWBT merely attempted to respond to the concerns of some petitioners that wished to require a declaration than an RFP was given to

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[20] ALTS at pp. 6-7.

[21] SWBT Comments, Transmittal No. 2433, at p. 4.

[22] AT&T at pp. 3-4, MFS at pp. 3-5.

multiple vendors before customers would be able to avail themselves of the RFP offer.

One need only examine MFS's own tariffs to find hundreds of examples of vagueness and ambiguity under such a standard. One of MFS's tariffs states that the rates charged for their services "which may or may not include optional features and functions will not exceed the amounts listed below." Thus, prospective customers cannot determine from the tariff what features are included with a particular service, nor what rate will be charged. In addition, MFS's tariff has over 1300 ICBs (many presumably filed as a result of winning RFP bids). These ICBs are completely undefined. As an example the first two ICBs are listed as follows:

Contract No.	State	Service Description	Monthly	Nonrecurring
00001	PA	High Cap Service	$1,740	$1,930
00002	PA	High Cap Service	$ 149	$ 0

From MFS's description, all that anyone can determine is that MFS has offered two services with identical descriptions and vastly different prices. SWBT's RFP tariff is extremely precise in comparison.

VI. MCI MISCHARACTERIZES SWBT'S CURRENT USE OF THE LIMITED PRICING FLEXIBILITY AVAILABLE TO IT.

MCI and AT&T claim that SWBT has not taken advantage of the pricing flexibility that it currently has.[23] MCI claims that only 10% of DS3s in Texas and 35% of the DS3s in Missouri utilize

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[23] MCI at pp. 11-13; see also AT&T at p. 6, fn. 11.

the mileage element which is discounted under the Zone Density Pricing Plan.

MCI provides no data to support these percentages, nor the assumptions underlying its calculations. It is unclear whether MCI simply assumed that total channel terminations divided by two equals the number of applicable circuits. This assumption would be incorrect. MCI cannot assume that all DS3 channel terminations connect to another DS3 channel termination, since in many cases, a DS3 channel termination is connected to a DS3 to DS1 multiplexer. In addition, in those cases where a DS3 channel termination connects to another DS3 channel termination, the second channel termination may or may not be in the same LATA or in SWBT's territory.

Likewise, AT&T's claim that SWBT "has declined to take advantage of the increased pricing flexibility accorded to it by the Commission," must be rejected.[24] This argument wrongly assumes that SWBT has been granted flexibilities that are usable in the marketplace. The oppositions cite zone density pricing as an example. All zone density affords, however, is the ability to average prices on a smaller geographic area. Thus, it has only limited value beyond state-wide average pricing.

Even then, zone density pricing is only available when collocation is operational. Thus, for specific access markets, zone density provides no assistance in allowing SWBT to compete.

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[24] AT&T at p. 6; see also MCI at p. 15 and Time Warner at p. 12.

For example, in Dallas, a study commissioned by SWBT shows that competitors serve 37.1% of the high capacity market. The overwhelming majority of this business was gained by competitors without using collocation. In Houston 30.5% of the high capacity market is served by competitors with more leaving SWBT's network each month.

In addition, zone pricing is little help against the onslaught of pricing flexibilities possessed and used by SWBT's competitors. LEC competitors apparently have an unlimited number of "zones," unfettered ICB pricing ability, promotional capabilities, no requirement to offer services to similarly situated customers, no cost support requirements and the ability to make tariff filings on one day's notice.

MFS, for example, has over 1300 ICBs filed in its tariff. Zone pricing is of little use when competitors operate under a completely different pricing paradigm.

VII. CLAIMS BY THE OPPOSITIONS THAT CUSTOMERS WOULD UTILIZE THE RFP PROCESS AS A SHAM SHOULD BE REJECTED.

MFS claims that "SWBT has provided no information by which the Commission or other interested parties can determine whether an RFP is in fact bona fide, or is simply a sham."[25] This claim implies that MCI has engaged in a sham. MFS's allegations in this regard should be rejected. SWBT has done all it reasonably can to ensure that no sham occurs.

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[25] MFS at p. 4.

The only RFPs in question in this proceeding are the ones that led to the tariff provisions filed by SWBT, namely, the RFPs issued by MCI. No party can seriously claim that MCI's RFPs in this case were a "sham." Since MCI, in fact, awarded the business to "another vendor," MCI did not engage in a "charade" just to get lower prices from SWBT. Unless a party has solid evidence that MCI has engaged in a "sham" in this matter, this subject is irrelevant.

Furthermore, the Commission is not required to rule that all RFPs issued by all customers in the future are valid to allow SWBT's filing to take effect. In the two instances SWBT has described here, the RFPs issued by MCI constitute adequate evidence to conclude that competition warrants the filings SWBT made.

SWBT has made the tariff language as explicit as possible to ensure that RFPs are in fact sent to multiple vendors. As stated in SWBT's Direct Case, any customer verification requirement is antithetical to the RFP process.[26]

Any argument that suggests that customers would willfully compromise the facts in an attempt to "abuse" the RFP process is an indictment of the industry participants. Such speculation is purely hypothetical, and cannot be used to reject SWBT's instant filings.

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[26] Direct Case at pp. 5-6.

VIII. THE BUREAU CAN PROPERLY ADDRESS THIS MATTER IN A TARIFF PROCEEDING.

MFS and ALTS have claimed that SWBT's proposals should not be addressed here, but as part of the Commission's review of the price cap rules.[27] However, just because the Commission is addressing general pricing flexibility issues in the price cap review docket, it is not precluded from addressing SWBT's specific proposals here.

Since competition is intensifying so rapidly, this matter should not be delayed by making it part of the price cap review. SWBT cannot wait for broader relief in light of the competition currently vying for telecommunications business.

MFS claims that addressing this issue through "an ad hoc waiver process" does not ensure that all relevant factors are considered. On the contrary, SWBT believes that the Bureau has been presented with all possible relevant (and many irrelevant) factors in this proceeding. In this proceeding SWBT seeks only to avail itself of a long standing Commission policy -- the competitive necessity doctrine. There is nothing ad hoc about it, either in terms of waivers or rulemakings.

Contrary to the representations of some parties, this proceeding will not prejudice upcoming decisions in other proceedings. While the evidence here is certainly relevant to those proceedings, the instant matter is a "live" issue that must be addressed quickly to allow customers maximum choices in their

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[27] MFS at p. 14; ALTS at p. 7.

telecommunications purchases. The longer a decision is delayed, the longer it will be before SWBT is allowed to more fully compete for that business, and the longer customers will have to wait before they can realize the full benefits of effective competition.

IX. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Commission deny all the petitions filed against its Transmittal No. 2433 and 2449, and allow SWBT's transmittals to take effect as scheduled.

Respectfully submitted,

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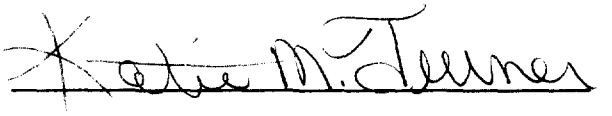
October 10, 1995

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "Rebuttal Of Southwestern Bell Telephone Company" in Docket No. 95-140, Transmittal Nos. 2433 and 2449 has been filed this 10th day of October, 1995 to the Parties of Record.



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